United States Court of Appeals

for the Second Circuit

AMICUS BRIEF

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IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

JUDY C. EGELSTON,

Plaintiff-Appellant,

v.

STATE UNIVERSITY COLLEGE AT GENESEO, et al.,

Defendants-Appellees.

On Appeal From The United States District Court For Western District of New York

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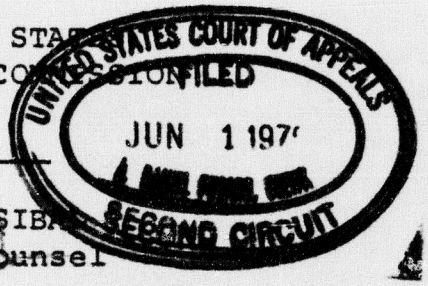
BRIEF FOR THE UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE



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BRIEF FOR THE UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE

STATEMENT OF FACTS

The facts relevant to the Title VII issues may be briefly summarized.

Plaintiff, Dr. Judy Egelston, was hired by the defendant, State University College at Geneseo (hereafter the University), as an assistant professor

in the Division of Educational Studies in September, 1970. In March of 1972, a Faculty Committee on Retention, Promotion and Tenure recommended that her teaching contract be renewed for another two years. The defendant's administrators, however refused to renew Dr. Egelston's contract. Dr. Egelston was advised of the non-renewal in May, 1972. Since one year remained in her existing contract, she was permitted to, and did in fact, teach the next academic year, from the fall of 1972 until the summer of 1973.

On January 24, 1973, midway through the academic year, Dr. Egelston wrote to the Office of Federal Contract Compliance (OFCC) requesting a compliance review of the university. The letter read, in pertinent part:

> "I would like to request a compliance review of SU College at Geneseo since I have reason to believe there is sex discrimination in the areas of hiring, promotion, and salaries. I have collected specific information regarding my own situation. . . ."

On February 9, 1973, Dr. Egelston also filed a charge of discrimination with the New York State Division of Human Rights.

At the time Dr. Egelston wrote OFCC, that agency had an agreement with EEOC which provided that complaints filed with the Office of Federal Contract Compliance were to be transmitted to the Commission which would treat such complaints as Title VII charges. Dr. Egelston's January, 1973 complaint was never transmitted to the EEOC. Shortly after receiving Dr. Egelston's charge, OFCC did refer it to the Regional Civil Rights Office of the Department of Health, Education and Welfare. HEW has held the original charge from March 5, 1973, to at least June 11, 1975[1/] but did not commence an investigation of Dr. Egelston's allegations because of a backlog of complaints.

1/ The Commission submitted its brief, amicus curiae, to the district court on that date.

In this interval, Egelston retained private counsel, who on June 24, 1974, filed a verified charge with the Equal Employment Opportunity Commission's Buffalo Office as an amendment to the allegations earlier filed with OFCC. In this amended charge, Egelston stated that one and a half years earlier she had filed charges with the OFCC and the New York Human Rights Division. She also specified that her teaching contract was not renewed solely on account of her sex and that, while she was employed by the university, she was paid less than similarly qualified male professors. On October 4, 1974, the Justice Department issued to Dr. Egelston her Notice of Right to Sue. The complaint in this action was filed within 90 days thereafter.

ARGUMENT

I

PLAINTIFF'S LETTER TO THE OFFICE OF FEDERAL CONTRACT COMPLIANCE CONSTITUTED FILING A CHARGE WITH THE EEOC

The Equal Employment Opportunity Commission and the Office of Federal Contract Compliance (OFCC), on May 20, 1970, entered into a memorandum of understanding concerning the processing of complaints of employment discrimination by contractors subject to both Title VII and Executive Order 11246. This agreement was in effect when Dr. Egelston filed her complaint with the OFCC on January 24, 1973 and is part of the formal procedural regulations of both agencies. The agreement provides in pertinent part:

> a) OFCC shall promptly transmit complaints filed with it under Executive Order 11246, as amended, to EEOC which shall treat such complaints as charges filed under Title VII of the Civil Rights Act of 1964. 35 Fed. Reg. 8461 (May 29, 1970) 2/ (emphasis added).

2/ The agreement has since been amended to provide in pertinent part:

> 10, Complaints filed with the OFCC shall be deemed filed with EEOC and OFCC shall promptly transmit such charges to the appropriate EEOC District Office. 39 Fed. Reg. 35855 (Oct. 4, 1974).

Under this agreement, the EEOC treats complaints filed with OFCC as charges filed with it, as of the date they are received by the OFCC. The Commission and OFCC have agreed in essence that the OFCC shall act as an agent for receipt of service of charges for the EEOC for charges falling within the Commission's jurisdiction. This is in keeping with section 705(g)(1) of Title VII. 42 U.S.C. §2000e-4(g)(1) which authorizes the EEOC "to cooperate with, and with their consent, utilize regional, state, local and other agencies. . . ." In the only appellate case of which we are aware that the practice has been in issue, the Ninth Circuit indicated its approval of this principle by reversing a district court's decision which had held that a charge filed with OFCC within the limitations period under Title VII was not sufficient to invoke the jurisdiction of the EEOC. EEOC v. Collator

Corp., __F.2d__, 7 FEP 1258 (9th Cir. 1974), reversing, __F.Supp. __, 7 FEP Cases 934 (Wash. 1973). 3/ This court should follow the ninth circuit's opinion in Collator.

The defendant argues that the plaintiff's letter to the OFCC does not meet the requirements of a charge because it does not set forth specific dates or events (Appellee's brief p. 7-8). Under the applicable Commission regulation, 29 C.F.R. §1601.11(b), an adequate charge is defined as:

> a written statement sufficiently precise to identify the parties and to describe generally the action or practices complained of.

3/ In EEOC v. Nicholson File Co., et al., 408 F.Supp. 229, 235 (D. Conn. 1976) the charging party filed a complaint with the OFCC which subsequently referred the complaint to the Commission. The court held that the time limitation in which to file a charge with the EEOC was tolled during the pendency that OFCC held the complaint. In Nicholson, the charging party's complaint to OFCC was filed in December 1969--before the Commission and OFCC entered into the Memorandum of Understanding.

Egelston's letter[4] to the OFCC is adequate to be deemed a charge since it meets the purpose of "see[ing] what the grievance is about." Jenkins v. United Gas Corp., 400 F.2d 28, 30 n.3 (5th Cir. 1968). Allegations equally as general as those in the plaintiff's letter to the OFCC have repeatedly been held adequate to constitute proper charges under Title VII. See, e.g., Blue Bell Boots, Inc. v. EEOC,[5] 418 F.2d 355 (6th Cir. 1969); Georgia Power

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4/ Egelston's letter to the OFCC reads:

> I would like to request a compliance review of SU college at Geneseo since I have reason to believe there is sex discrimination in the areas of hiring, promotion, and salaries. I have collected specific information regarding my own situation.

5/ The charges held sufficient to invoke the EEOC's jurisdiction in that case originally provided only:

> "The J.W. Carter Shoe Company discriminates against Negroes by:
>
> Restricting Employment Opportunities for Minorities.
>
> Maintaining a discriminatory promotion program.
>
> Restricting Training Opportunities for minorities."
>
> Blue Bell at 356.

v. EEOC, 412 F.2d 462 (5th Cir. 1969). Even charges filed by EEOC Commissioners need not specify particular instances of discrimination. See, Bowaters Southern Paper Corp. v. EEOC, 428 F.2d 799 (6th Cir. 1970); cert. denied, 400 U.S. 942 (1970); Local 104, Sheet Metal Workers v. EEOC, 439 F.2d 237 (9th Cir. 1971); Sparton Southwest, Inc. v. EEOC, 461 F.2d 1055, 1058 (10th Cir. 1972). Hence, under all the relevant authority, the allegations in Egelston's letter to the OFCC constituted the filing of a charge with the EEOC.

II

THE PLAINTIFF'S CHARGE WAS TIMELY FILED WITH THE E.E.O.C.

A. The notice of non-renewal of plaintiff's contract did not start the running of the time limitation on the E.E.O.C. charge.

The university, throughout the course of the litigation has taken the position that the discrimination alleged by the plaintiff concerned a single event--the nonrenewal of her contract of which she was notified in May, 1972. On this basis the university asserts that there was no timely charge filed with E.E.O.C. to support the Title VII action even if filing with the OFCC in January , 1973, could be deemed a filing with E.E.O.C. The notice of non-renewal, however, did not delimit the sex discrimination alleged by plaintiff. That notice did not terminate her employment which continued for more than a year thereafter. It was always possible, at least until plaintiff was actually terminated, that the university would reconsider its decision. Indeed, the plaintiff has argued that, even after she was notified of the non-renewal of her contract, efforts were made on her behalf to have the university reconsider its decision. (See Plaintiff's

Brief in Support of Motion To Compel Discovery and In Opposition To Defendant's Motion to Dismiss, p. 3). Under the circumstances, the discrimination against plaintiff was continuing at the time she filed her charges with OFCC in January, 1973 and with the state agency in February, 1973. See, Johnson v. University of Pittsburgh, 359 F.Supp. 1002, 1006 (W.D. Penn. 1973); Weise v. Syracuse University, 522 F.2d 397, 409 (2d Cir. 1975).

Furthermore, Dr. Egleston in her charge did not claim discriminatory conduct on the part of the defendant based on a single act; rather she asserted that at the time of her filing, the defendant was engaged in an ongoing pattern of discrimination affecting females generally and her personally. Dr. Egleston, while still employed by the university, wrote to the OFCC

> . . . I have reason to believe that there is sex discrimination in the areas of hiring, promotion and salaries. I have collected specific information regarding my own situation.

This is a charge of continuing, on-going discrimination.

The courts have long held that an employee's retention of a discriminatory employment practice constitutes a continuing violation as long as that practice

is maintained. See, Macklin v. Spector Freight Systems, Inc., 478 F.2d 979 (D.C. Cir. 1973); Belt v. Johnson Motor Lines, Inc., 458 F.2d 443 (5th Cir. 1972).[6/]

This case is essentially identical to that of Macklin v. Spector Freight Systems, Inc., supra, where the Court held:

> Allegations that a discriminatory. . . system continues to exist and continues to deny appellants jobs are sufficient to constitute a timely filing with the agency [the Commission].
>
> 478 F.2d 987

6/ The defendant relies on Olson v. Rembrandt Printing Co., 511 F.2d 1228 (8th Cir. 1975), for the proposition that plaintiff's charge was not timely because it did not concern a continuing violation. There, the plaintiff has already been separated from her job for several months when she filed a claim regarding the pay scale. Here, on the other hand, Dr. Egelston charged discriminatory practices on the part of the university while she was still an employee of the university and she alleged that the violations were continuing.

B. In any event the charge was timely since it was filed within 300 days of the notice of non-renewal.

Even assuming that notice of non-renewal in May, 1972 marked the start of the period for filing with E.E.O.C., the charge filed in January, 1974 was timely since it was within 300 days of the act complained of. Section 706(e) of Title VII provides:

> A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred *** except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice *** such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

New York does have a state fair employment agency and plaintiff did in fact file with that state agency in the time permitted by state law. Thus, the time for filing charges with E.E.O.C. was, under Section 706(e), 300 days.

There is no support in the Title VII statutory scheme for the defendant's assertion that, in order for the charging party to take advantage of the 300 day federal filing period, she had to file with the New York State Commission within 180 days. A plain reading of §706(e) reveals that as long as a complainant meets the relevant state filing requirement--whatever period that may be--the time for filing with the EEOC is extended to 300 days. Section 706(e) simply provides that an individual has 300 days to file with the EEOC if that individual has "initially instituted" state proceedings. The courts have long held that the words "initially instituted" are not to be read literally. See, Love v. Pullman Co., 404 U.S. 522, 525 (1972). Initial filing with a state agency is accomplished so long as the state agency has had an opportunity to resolve a charge before the EEOC begins to process it. Hence, the actual order of filing with state and federal agencies is irrelevant. See, Vigil v. American Tel. and Tel. Co., 455 F.2d 1222 (10th Cir. 1972).

Nowhere has Congress indicated that it intended to restrict the time for filing a charge with a state agency to less than that allowed by state law. And indeed for this Court to do so would be unwarranted judicial legislation creating "an additional procedural technicality" of the sort that the Supreme Court rejected in Love v. Pullman, 404 U.S. 522, 526 (1972). Congress' purpose in requiring resort to state agencies was to encourage state action and not to restrict it in any way. See 110 Cong. Rec. 12725 (1964).

The Purpose of the 300 day provision was to give the state time to act. That purpose is served by giving the state such time to act on charges timely filed under state law. In its brief, the defendant relies exclusively on Olson v. Rembrandt Printing Co., 511 F.2d 1228 (8th Cir. 1975) to support its position for the short 180 day filing period. Olson, however, is readily distinguishable. The question presented there was;

> . . .whether a charge is timely filed with the EEOC when it was not filed with the state commission within the state's limitation, or filed with the EEOC within the 180-day period and then referred by the EEOC to the State commission for processing. 511 F.2d at 1233 (Emphasis supplied).

Thus, in Olson, unlike this case, the state charge was not timely filed, since Missouri law provided a 90-day

filing period with which the complainant had not complied. The court ruled that "the State limitation period cannot govern the efficacy of the federal remedy," and that therefore all complainants were to be given at least 180-days to file with the State agency prior to filing with the EEOC. 511 F.2d at 1232. Since, however, the Olson charge was not filed with the State within 180 days, it further held that the requirements of §706(e) were not met. The rationale of Olson, then, is simply that a State cannot shorten the period Congress has determined appropriate for invoking federal Title VII rights.

The dicta in Olson states that all charges "must be filed with the state or local agency within the 180 days." 511 F2d at 1233 (Appellee's br. at 10). The only conceivable basis for this statement is the fact that no state in the Eighth Circuit has a limitations period longer than six months from the act complained of. Thus, the Olson dicta accurately reflects the situation in that circuit.[7/] The Olson dicta is

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7/ See, Williamson v. Chevron Research Co., F.Supp. , 12 FEP Cases 95, 96 n.2 (N.D. Cal. 1976) where the Court apparently thought that this is what the Olson dicta referred to.

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inappropriate in jurisdictions such as New York, California and the District of Columbia which have one year limitation periods for filing state charges.[8/] Cf. Ashworth v. Eastern Airlines, 389 F.Supp. 597, 600 (E.D. Va. 1975) holding that where filing with the District of Columbia agency was proper 213 days after discharge, plaintiff could properly file with the EEOC on the 262nd day.

In short, the court in Olson did not address the issue in this case and the dicta in that decision is not a sufficient basis for this Court to impose a shorter time limitation than the state has fixed for filing state charges. The plain language of Section 706(e) indicates that Congress did not intend to force all states to have a uniform 180-day limitation period (or less) in order to permit charging parties to take advantage of the 300 day federal period.

8/ The state and federal charge must, of course, be filed wichin 300 days of the unlawful act to comply with 706(e).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the decision of the district court be reversed.

Respectfully submitted,

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May 28, 1976

CERTIFICATE OF SERVICE

It is hereby certified that copies of the foregoing Brief of the United States Equal Employment Opportunity Commission, were mailed this day, postage prepaid, to the following counsel of record:

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